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Supreme Court, U.S.
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No. 03-1249

IN THE

Supreme Court of the United States

PHYLLIS FILOSO,

Petitioner,

v.

PRINCE WILLIAM COUNTY SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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Respondent Prince William County School Board hereby submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner Phyllis Filoso.

STATEMENT OF THE CASE

Petitioner Phyllis Filoso ("Filoso") was employed as a science teacher under a continuing contract by the Prince William County Public Schools from 1996 until July of 2002, when the Prince William County School Board ("the School Board") voted to uphold the recommendation of a statutory grievance panel that Filoso be dismissed from her employment for excessive absences. Defendant's Summary Judgment Ex. A—Plaintiff's Uncontested Facts, para. 1; Def. SJ Ex. B—Recommendation of Fact Finding Panel.

Filoso subsequently filed suit in the United States District Court for the Eastern District of Virginia under the Americans with Disabilities Act ("the ADA") and Title VII, alleging that she was terminated because she suffered from idiopathic environmental intolerance syndrome ("IEIS"), and in retaliation for filing a complaint based on her alleged disability.

On July 3, 2003, the Honorable Leonie M. Brinkema granted summary judgment to the School Board on the grounds that: (1) the School Board provided all reasonable accommodations before terminating Filoso for excessive absenteeism, (2) Filoso was unable to perform her job even with reasonable accommodations since she was unable to go to work, and (3) there was insufficient evidence of retaliation. Transcript of Motions Hearing before the Honorable Leonie M. Brinkema, U.S. District Judge, pp. 20-24; U.S. District Court Order of July 3, 2003.

The School Board had also filed a "*Daubert*" Motion seeking to exclude expert testimony that Filoso suffered from a disability in the form of IEIS, also known as "MCS" or multiple chemical sensitivity syndrome, a controversial and unaccepted medical diagnosis.[1] Since Judge Brinkema assumed, but did not decide, that Filoso suffered from a disability for purposes of summary judgment, she did not reach the *Daubert* motion, which was an integral part of the School Board's argument that Filoso was not disabled within the meaning of the ADA. Transcript of Motions Hearing, U.S. District Court, pp. 21-22.

On July 29, 2003, Filoso appealed the district court's grant of summary judgment in favor of the School Board to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the district court's decision. Unpublished Opinion of the U.S. Court of Appeals for the Fourth Circuit, December 3, 2003. Filoso now appeals the Fourth Circuit's decision to this Court.

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1. The School Board argued that testimony that Filoso suffered from IEIS or MCS was inadmissible as a matter of law since inter alia, that condition is not a recognized diagnosis accepted by the medical community, lacks scientific validity, has no demonstrated etiology, has not been subjected to testing nor approved in the medical literature, and has never been admitted in evidence by any federal court. Further, Filoso's treating physician had tesitfied that the medical community did not accept MCS or IEIS as a valid diagnostic entity, and that neither he nor anyone else could link Filoso's symptoms to any particular odor, substance, chemical, or level of exposure in any of the school buildings in which she worked.

SUMMARY OF THE UNDISPUTED FACTS SUPPORTING THE DISTRICT COURT'S RULING

A. Filoso's Pattern Of Absences

Beginning in the 1999-2000 school year, Filoso began to absent herself from work as a science teacher at Brentsville District Middle Senior High School, either failing to show up at all, or leaving soon after her arrival. Not only was Filoso absent an excessive amount, but the pattern of her absences clustered around weekends and holidays. After the beginning of May, which coincidentally concluded the performance evaluation cycle for continuing contract (tenured) teachers, Filoso was absent from work continuously through the end of the school year. Def. SJ Ex. C—Fitzgerald Affidavit; Def. SJ Ex. D—Chart of Absences; Def. SJ Ex. E—Summary of Absences.

After the Christmas holidays, Filoso was absent from Brentsville, in whole or in part, 56 of the 194 days her contract required her to work. From February 2, 2000, which was the beginning of the second academic semester, Filoso was absent 50 of 96 days, or 52% of the time. From May 1, 2000 through the end of the school year, Filoso was absent 35 of 37 workdays, or 95 % of the time she was required to work. *Id.* During the 1999-2000 school year, Filoso did not work immediately prior to or following weekends and/or holidays, 50 of 56 days, or 89% of the days she was absent. *Id.*

After she was transferred to Forest Park Middle Senior High School for the 2000 – 2002 school year, Filoso repeated her pattern of excessive absences, absenting herself from her

classroom responsibilities, in part or in whole, 53 of the 195 contracted workdays, or 27%. *Id.* The majority of those absences occurred during the second semester, which began on January 29, 2001. During that semester, Filoso was absent 45 of 95 days or 47 % of the time she was required to work. From May 1, 2001 through the end of the school year, she was absent 31 of 34 days, or 91% of the time. Forty-eight of the 53 days Filoso was absent from school, or 90% of the days absent, fell prior to or following holiday weekends. *Id.*

On October 16, 2001, Filoso was placed on administrative leave with pay and on November 2nd, recommended for dismissal after she had been absent, in whole or in part, 30 of 37 days, or 81% of the time she was required to work during the first six weeks of the 2001–2002 school year. By that time, entire classes of students who had been assigned to Filoso had never even met her. Def. SJ Ex. F—Filoso Contracts; Def. SJ Ex. G—Gill Deposition, pp. 86-87; Def. SJ Ex. H-2—Gill letter of September 18, 2001.

B. Accommodations Provided To Filoso At Brentsville High School, 1999-2000

Filoso claimed that she suffered adverse reactions to undetermined irritants during her employment at Brentsville High School during the 1999-2000 school year, while portions of the school building were being sequentially renovated. For example, Filoso claimed to experience "flu-like" symptoms in the fall of 1999, which she attributed to new carpeting and shelving and inadequate air conditioning that she encountered on one occasion when she took her students to the school library. Def. SJ Ex. N—Filoso Deposition, pp. 116-119; Def. SJ Ex. Q—Filoso List of Accommodation Requests; Def. SJ Ex. R-7—May 25, 2000

Email from Michael Mulgrew to Filoso. However, Filoso did not complain to the principal nor make any request for accommodation. Def. SJ Ex. N, pp. 116-119.

In January, Filoso claimed to smell an odor which made her "kind of sick to my stomach," which she attributed to "the stuff they were using to put down the tile" on the floor of a classroom down the hall. *Id.* pp. 125-27. Filoso could not identify the "stuff" and conceded that the odor "could have been other things—I mean, there was lots of chemical usage going on in that building." *Id.* p. 127. A week later, she complained about the odor to her principal, Michael Mulgrew, but made no request for accommodation. *Id*, pp.127-28.

School officials at Brentsville High School made numerous accommodations in response to Filoso's subsequent complaints that she was sensitive to multiple unidentified substances and volatile organic compounds ("VOCs") in the building which she associated with the ongoing renovations. Filoso was allowed to use a charcoal air filter and fan in her classroom, her hall duties were modified, she was frequently permitted to leave school early, and her classroom was repeatedly changed (five times in April alone). She was moved away from areas of the building which were undergoing renovation, she was moved to a trailer, moved back into a completed area of the building, moved to a free standing modular unit some distance from the building, allowed to teach students outdoors, transferred unsuccessfully to a middle school, and simply permitted to stay home on many days when she complained of unidentified odors in the school. Finally, the school hired a "permanent" substitute just to cover Filoso's unpredictable absences. Def. SJ Ex. R-5—May 11, 2000 Email from Michael Mulgrew to

Rick Fitzgerald; Def. SJ Ex. R-6 – May 18, 2000 Email from Mulgrew to Steve Webb; Def. SJ Ex. W – Deposition of Michael Mulgrew pp. 46-47.

Each time Filoso was moved in the spring of 2000, so were her students. On occasion these moves also displaced other teachers and students. Filoso's repeated moves were disruptive to the instructional program of her students and the operation of the school. Although she occasionally showed up to drop off lesson plans, after May 3, 2000 and prior to her students' SOL exams, Filoso failed to come to work altogether. Def. SJ. Ex. C; Def. SJ Ex. D; Def. SJ Ex. E; Def. SJ Ex. O—Webb Affidavit; Def. SJ Ex. GG—Edelstein Deposition; Def. SJ Ex. Q—Filoso List of Accommodation Requests; Def. SJ Ex. R-7; Def. SJ Ex. N, p. 138; Def. SJ Ex. PP—Carbone Affidavit. After several weeks with Filoso out of school, Michael Mulgrew, her principal, reassigned her to Godwin Middle School where she worked one day and then went home with a headache. Def. SJ Ex. N, pp. 145-46.

When Filoso's absences continued despite these accommodations, school officials offered her a transfer to another high school. Filoso chose a brand new school, Forest Park High School, opening in the fall of 2000. *Id.*, pp. 155-56.

C. Accommodations Provided To Filoso At Forest Park High School, 2000-2001

During her first year at Forest Park (2000-01), Filoso immediately began to complain about various odors that she associated with that building, including bus fumes, sewer gas, floor wax, cleaning products, student perfumes, and nail

polishes. *Id.*, pp. 163-165, p. 183; Def. SJ Ex. G, pp. 81-83, p. 92; Def. SJ Ex. DD—Filoso Email of August 31, 2001; Def. SJ Ex. Q; Def. SJ Ex. R-7.

At Forest Park, Filoso's many complaints were also accommodated. She was excused from hall duties and permitted to teach her earth science students in a vacant math classroom with a window, rather than an interior classroom specifically designed and equipped as an earth science laboratory. Def. SJ Ex. N, pp. 136-64; Def. SJ Ex. G, pp. 12-13, 43-44; Def. SJ Ex. AA—Gill Handwritten Notes 2001. Filoso was also allowed to teach with her window open, despite complaints from students and parents about the temperature of the classroom and the need for children to wear additional clothes during the winter. She was permitted to use a fan and charcoal filter in her classroom. Def. SJ Ex. N, pp. 168-69; Def. SJ Ex. G, pp. 33-34, 52-53. One student was transferred from Filoso's class because her perfume made Filoso ill. Def. SJ Ex. N, pp. 71-72. After Filoso claimed that the odor of sewer gas was contributing to her symptoms, the building engineer installed filters on the roof top sewer vents. Def. SJ Ex. G, pp. 24-26.

After Filoso filed complaints with Virginia OSHA and the county building department, the school's environmental engineer conducted air quality tests which detected no odors, other than sewer gas emanating from dry traps on the roof of the building. Def. SJ Ex. GG, pp. 15-18; Def. SJ Ex. HH—Air Quality Report from Forest Park and Mercer Letter to Virginia OSHA. OSHA did not cite the school system nor advise that sewer gas was a health hazard. *Id.* No tests were ever conducted by OSHA or anyone else that identified the existence of any particular substance that caused Filoso's continued complaints. Def. SJ Ex. GG, pp. 15-18; Def. SJ Ex. G, pp. 21-26.

Despite these accommodations, Filoso's pattern of attendance problems persisted throughout the 2000-2001 school year. Numerous substitutes were retained to teach Filoso's classes and the instructional continuity of her students was repeatedly disrupted by her unanticipated absences. Def. SJ Ex. C; Def. SJ Ex. D; Def. SJ Ex. E; Def. SJ Ex. G, p. 86, pp. 88-90; Def. SJ Ex. PP.

D. Accommodations Provided To Filoso At Forest Park, 2001-2002

Much to Filoso's dissatisfaction, during her second year at Forest Park (2001-2002) she was assigned to an earth science laboratory because the student population had increased by 700 students and all classrooms were needed for their intended purposes. Def. SJ Ex. N, p. 168; Def. SJ Ex. G, p. 30. In addition, the district's science curriculum supervisor had advised the principal that all students (including Filoso's) were required to be in an equipped earth science classroom in order to comply with a state requirement that 40% of the curriculum include laboratory work. Def. SJ Ex. G, pp. 50-52. Filoso's placement in a room with a window the previous year had not diminished her pattern of absences. Def. SJ Ex. C; Def. SJ Ex. D; Def. SJ Ex. E.

Filoso was again allowed to use a charcoal filter and fan. Def. SJ Ex. KK—Fitzgerald Letter of August 26, 2001. Additionally, the school provided her with two HEPA air purifiers, and the building engineer installed a separate air filter in the HVAC vent of her classroom. *Id.* Even though neither Filoso nor her physician had ever identified a specific product or level of VOCs that triggered her symptoms, school officials reviewed Material Data Safety sheets for cleaning

products used in the school to ensure that they were nontoxic and had a low level of volatile organic compounds (VOCs). Def. SJ Ex. J—Smith Deposition, pp. 68-69; Def. S.J. Ex. JJ—Rice Affidavit; Def. SJ Ex. C; Def. SJ Ex. D; Def. SJ Ex. E.

Even before the beginning of her second year at Forest Park, Filoso failed to attend a required teacher workday. Def. SJ Ex. OO—Emails Regarding Filoso Attendance; Def. SJ Ex. C; Def. SJ Ex. D; Def. SJ Ex. E. She also failed to attend an in-service training. Def. SJ Ex. S; Def. SJ Ex. JJ. After school began, the school accommodated Filoso's demand that a system-wide training meeting be moved from her classroom despite the inconvenience to all faculty. *Id.* Science department meetings were also moved from Filoso's room although she was absent on the Friday afternoons when the meetings were held. *Id.* Filoso was again excused from hall duty. Def. SJ Ex. G, pp. 79-80.

On the first day back at school Filoso complained about bus fumes, although the buses had been gone for four hours and her new room had no window. Def. SJ Ex. N, p. 128. She was permitted to leave a faculty meeting early when she complained of floor wax fumes, although the school did not use floor wax. Def. SJ Ex. OO. From Sept. 4th to Oct. 16th, Filoso worked only seven days, leaving early on most of those days. Def. SJ Ex. C; Def. SJ Ex. D; Def. SJ Ex. E; Def. SJ Ex. JJ; Def. SJ Ex. G, p. 86.

The school accommodated Filoso's absences by pulling the science department chairman and other teachers from their own duties and hiring substitutes. Def. SJ Ex. G, p. 86; Def. SJ Ex. JJ. Filoso's absences persisted. Parental complaints increased, particularly from the parents of

students who were in Filoso's afternoon classes and had never even met their teacher. Def. SJ Ex. G, pp. 85-87; Def. SJ Ex. JJ. School officials were forced to hire a long-term substitute who was certified in earth science for the sole purpose of covering Filoso's classrooms when she failed to show up or left early. Def. SJ Ex. C; Def. SJ Ex. D; Def. SJ Ex. E; Def. SJ Ex. G, pp. 89-90. Consequently, by the fall of 2002, the school system was paying two teachers for one position.

On October 16th, 2002, Filoso was placed on administrative leave with pay and recommended for dismissal after she had been absent 30 of 37 days or 81% of the first six weeks of school. In the fall of 2002, Filoso filed several grievances alleging that the school division had failed to provide for the accommodations she had requested on the ADA complaint. Due to her attorney's repeated requests for continuances of hearings on the grievances, Filoso remained on paid leave until the following May when the School Board upheld the recommendation of a statutory grievance panel that she be terminated for excessive absenteeism.

REASONS FOR DENYING THE PETITION

A. The Fourth Circuit Court Of Appeals Properly Affirmed The District Court's Decision To Grant Summary Judgment In Favor Of The School Board Because The School Board Made All Reasonable Accommodations For Filoso's Alleged Disability.

For the sake of analysis, the district court assumed, but did not decide, that Filoso suffered from a disability that impairs a major life function. Transcript of Motions Hearing, U.S. District Court, p. 20. However, the court found that the School Board made reasonable efforts to accommodate

Filoso's many complaints. *Id.* Despite the numerous accommodations made by the School Board over the course of three school years, Filoso claimed that she was entitled to additional accommodations. For example, while at Forest Park, Filoso demanded that her classroom be disconnected altogether from the computerized central HVAC system, which provides air conditioning, heat, humidity and air quality control to the entire seven-acre building, housing 2000 students and 125 teachers. Def. SJ Ex. G, p. 64. The district court properly found that such a request was not reasonable given the competing need of the student body and faculty for a suitable learning environment, especially where the undisputed evidence established that school officials were prevented from disconnecting Filoso's classroom by building and health codes and such a measure would have a deleterious affect on the air quality and temperature of the classroom. Def. SJ Ex. G, pp. 61-62.

Similarly, Filoso demanded that her room be provided with a separate HVAC system. Again, the court properly ruled such a request unreasonable for the reasons previously stated, in addition to evidence that providing a separate HVAC system would cost $60,000 to $80,000 and take over a year to install. Def. SJ Ex. P—Deposition of Randy Dasher, pp. 35-39. Also there was no evidence that such drastic measures would ameliorate Filoso's alleged reactions to a host of never-identified substances, which condition(s) Filoso had described as requiring "constant modifications to the environment around her to ensure adequate ventilation and avoidance of a myriad of irritants." Plaintiff's Brief in Opposition to Summary Judgment p. 20.

Filoso also complained that the school system failed to eliminate "highly odiferous" cleaning products containing

VOCs. Although Filoso and her physician never identified any particular substance or product that triggered Filoso's alleged symptoms, school officials did determine that all products in use at Forest Park were nontoxic and had low levels of VOCs. Def. SJ Ex. JJ; Def. SJ C; Def. SJ Ex. D; Def. SJ Ex. E; Def. SJ Ex. J, pp. 68-69. Furthermore, it was not until September 13, 2001 that Filoso provided the school with the name of a company that sold cleaning substances which Filoso thought would reduce her symptoms. When school officials compared the recommended products with those cleaning products already in use at Forest Park, the VOC levels were similar, or even lower than those recommended by Filoso. Not only was the cost of the alternative products prohibitive but, procurement regulations and state law required school officials to test and bid out any new products, rendering Filoso's request too late to procure the products and re-clean the entire building. Def. SJ Ex. N, 190-196.

During her first year at Forest Park, Filoso had also demanded that school officials alter the existing design and function of the building and adjacent parking areas to move the school bus "drop-off area" to the opposite side of the building in order to eliminate any bus fumes entering the open window of her classroom. Def. SJ Ex. N, p. 183; Def. SJ Ex. Q; Def. SJ Ex. R-7; Def. SJ Ex. G, pp. 81-83. Filoso's request was patently unreasonable since the area designated for the drop-off and pick-up of students was specifically designed to comply with the Virginia Department of Education safety guidelines, to isolate bus traffic from pedestrians and student drivers, and to funnel students directly into the adjacent classrooms rather than through a warren of hallways and common areas. Def. SJ Ex. G pp. 81-83; Def. SJ Ex. P, pp. 33-35. The evidence

demonstrated that such an accommodation would be prohibitively expensive, divert monies from other capital improvements with higher priority and benefit to others, and disrupt the entire operation of the school. The district court found these proposed accommodations, as well as Filoso's insistence on teaching her earth science classes in a non-equipped classroom, unreasonable. Transcript of Motions Hearing, U.S. District Court, pp. 21-22.

B. Filoso Was Not An Otherwise Qualified Individual Because She Was Not Performing Her Job At A Level That Met Her Employer's Expectations And Was Unable To Come To Work Even With Reasonable Accommodations.

The record of Filoso's lack of attendance at three different schools over the course of three years, despite a host of accommodations, demonstrated that Filoso was not qualified to teach. Regardless of the quality of a teacher's classroom skills, attendance is an essential function of a teacher's job which impacts the instructional continuity of students and frequent absences "render a teacher unable to function effectively." *Tyndall v. National Education Centers, Inc*, 31 F.3d 209, 213 (4th Cir. 1994). The Fourth Circuit properly recognizes that an employee who does not come to work cannot perform any of her job functions and is, therefore, not qualified within the meaning of the ADA or Title VII, nor is she living up to her employer's job expectations. *See Tyndall, supra; Lamb v. Qualex, Inc.*, 33 Fed. Appx. 49, 56-57 (4th Cir. 2002); *Halperin v. Abacus Tech. Corp.*, 128 F. 3d 191,199 (4th Cir. 1997). The trial court correctly ruled that a school system is not obliged to "interrupt or interfere with the educational process of their students to accommodate a teacher who is unable to come to work

because of a disability." Transcript of Motions Hearing, U.S. District Court, p. 21. Thus, the court found that the School Board made reasonable accommodations for Filoso but that "she was unable to perform the essential functions of the job because she simply wasn't coming to work." *Id.*

C. The Non-disputed Evidence Established that the School Board Did Not Retaliate Against Filoso.

The district court noted that Filoso received two letters from the School Board regarding the negative effects of her absenteeism, several months before she ever filed her formal complaint alleging an ADA violation. Since Filoso's absenteeism persisted despite notice that she would be terminated for any additional unexcused absences, the court found no nexus between the filing of Filoso's ADA claim in the fall of 2002 and her subsequent termination. The district court properly concluded that "there's absolutely no evidence in this record that would support the inference that the termination was taken out of retaliatory reasons." Transcript of Motions Hearing, U.S. District Court, p. 23.

A mere temporal relationship between the filing of a grievance and an adverse employment action is not sufficient to establish the causal relationship necessary to show retaliation or that any employee was terminated because of a disability. "Mere knowledge on the part of an employer that an employee . . . has filed a discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for adverse personnel action against the employee." *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) quoting *Williams v. Cereberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989)

The record contained no evidence that Filoso was fired for any reason other than her failure to come to work and the disruptive effect of her absences on her students and the operation of the school. Although Filoso had a subjective belief that school officials terminated her because they were "fed up" with her disability, the objective evidence demonstrated that school officials were, if anything, frustrated by Filoso's continued absences despite their persistent efforts to accommodate her complaints. Filoso failed to work even when she was given the accommodations that she requested and it was readily apparent that her absences, which were clustered around weekends and holidays, had nothing to do with her alleged symptoms.

Since Filoso relied solely on speculation and failed to present affirmative evidence that her alleged disability was a determining factor in her termination, summary judgment was appropriate. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993); *Ennis v. Nat. Assn. Of Bus. Educ. Radio, Inc.*, 53 F.3d 55, 59.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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